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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

No. 41894-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

CHENEY R. SALAZAR,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The defendant was originally charged by Information on May 25, 2010, with Identity Theft in the Second Degree, RCW 9A.35.020. (CP 49-50). The allegation was that the defendant cashed a \$450 check stolen from a business in Westport that had been burglarized. On June 28, 2010, the defendant pled guilty to an Amended Information charging Forgery, RCW 9A.60.020. (CP 1). The stated reason for the amendment was that the employee who handled the transaction was no longer working for the business and the sentence range would provide for incarceration in the county jail rather than prison. (CP 53-54).

On July 26, 2010, prior to sentencing, the defendant was released for the purpose of obtaining a chemical dependency evaluation. (CP 55). On August 16, 2010, the defendant was released to Community Corrections Officer Kiser for transport to drug treatment where he was ordered to remain for period of 28 days. Sentencing was set over to September 27, 2010. The defendant walked away from treatment. A bench warrant was issued on September 1, 2010. (CP 60).

The defendant failed to appear for sentencing. In the interim, the defendant was convicted of the crime of Attempt to Elude a Pursuing Police Vehicle in Clallam County Superior Court Cause No. 10-1-452-1 for events that occurred on October 21, 2010, while the bench warrant for his arrest was still outstanding. (CP 39). He was committed to prison.

An order for transport from Department of Corrections was entered directing that the defendant appear on February 14, 2011. Counsel for the defendant filed a motion asking leave to withdraw from his representation of the defendant, asserting that the defendant was alleging ineffective assistance of counsel. (RP 02-14-2011, p. 2). Upon inquiry of counsel it was determined that the defendant was alleging that he had not been informed that a new felony conviction might increase his sentencing range and that the defendant believed that the sentence recommendation was to be 4 months and not 7 months. (RP 02-14-2011, pp. 3-4).

The motion to withdraw was denied and the matter proceeded to sentencing. (RP 5). The court imposed a sentence of 14 months. (RP 7). Entry of the judgment and sentence was continued over to February 22, 2011, following misbehavior by the defendant in the courtroom on February 14, 2011, in which the defendant was found in contempt of court. The court subsequently made written findings on February 15, 2011. (CP 46-47). The court directed that the defendant was not to receive credit for time served against the sentence on the Forgery charge until the defendant

apologized for his conduct. The judgment and sentence was entered on February 15, 2011. (CP 2-10).

The defendant was brought back before the court on February 22, 2011, and once again declined to apologize. The court imposed a sanction of 30 days to be served consecutive to the Clallam County sentence previously imposed and further ordered that the defendant not receive credit for time spent in the Grays Harbor County Jail against the Clallam County sentence. (CP 48).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly denied the defendant's motion to withdraw his guilty plea.

Alleged failure to inform the defendant of the consequence of future criminal behavior.

A defendant is entitled to be informed of the consequences of his plea of guilty that will occur to him at the time he pleads guilty. A defendant must be advised of the direct consequences of the plea. A direct consequence has been defined as one that has a "definite, immediate and largely automatic affect on the range of the defendant's punishment." This would include information concerning the length of sentence resulting from the defendant's plea of guilty. *In re Personal Restraint Petition of Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009).

There is no claim in this matter that the defendant was misinformed of the sentence range applicable to him at the time of his plea of guilty. He also understood that the State would make a recommendation for a sentence within the standard range. At the time of his guilty plea he had a standard range of 4 to 12 months. (CP 33).

While the last paragraph of the plea agreement provides that any subsequent conviction may increase his offender score and sentence range, that is not something that is negotiated between the parties as part of the plea agreement. That is a statement of the law that will apply regardless of any agreement of the parties.

For purposes of calculation the offender score and sentence range a “prior conviction” is a conviction that exists before the date of sentencing for the offense for which the offender score is being calculated. (RCW 9.94A.525(1)). Accordingly, when the defendant pleads guilty and sentencing is continued, any conviction that occurs in the interim or is later discovered will be included in the offender score at sentencing. *State v. Thomas*, 79 Wn.App. 32, 42, 899 P.2d 1312 (1995); *State v. Kennar*, 135 Wn.App. 68, 76, 143 P.3d 326 (2006). This is not a result that can be the subject of negotiations between the parties. *State v. Gronnert*, 122 Wn.App. 214, 93 P.3d 200 (2004).

The State is not aware of any case requiring defense counsel to inform the defendant that if he commits new criminal acts following his

plea of guilty that a conviction for those criminal acts prior to sentencing will increase the defendant's sentencing range.

Defendant's alleged misunderstanding of the State's sentence recommendation.

It is immediately apparent why the trial court did not address this allegation and schedule a hearing. Whatever else the defendant wanted to say about what he thought the State's sentence recommendation would be, he understood that it would be a sentence recommendation within the standard range. There is no reference of any kind in the plea agreement or the Statement of Defendant on Plea of Guilty that the State would be recommending a sentence below the standard range. The Standard range at the time of his of guilty was 4 to 12 months in the Grays Harbor County Jail. The trial court realized, as should this court, that the defendant's new conviction raised his offender score to a range of 1 year and a day to 14 months in prison. The State was no longer in a position to recommend a sentence within the previous 4 to 12 month range.

A plea of guilty may be withdrawn only when it is necessary to correct a "manifest injustice." *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974). The Washington Supreme Court has suggested four indica of manifest injustice that would permit a defendant to withdraw his guilty plea: (1) ineffective assistance of counsel; (2) failure of the defendant to ratify his plea; (3) an involuntary plea; and (4) failure by the prosecution to

honor the plea agreement. *Taylor*, 83 Wn.2d at 597. None of those circumstances has been shown here.

The defendant's signature on the plea agreement, along with that of his lawyer, is strong evidence that the plea is voluntary and made with an understanding of the consequences. *State v. Pugh*, 153 Wn.App. 569, 577, 222 P.3d 821 (2009). This defendant was told by the trial judge, also, that the court was not bound by any sentencing recommendation. How can this court now find a "manifest injustice" when the defendant has committed new acts resulting in additional criminal history that raises his offender score to a range above what was contemplated at the time of his plea? This court should find that the plea of guilty was voluntarily made.

In any event, even if the court were to grant the relief requested by the defendant, the best that the defendant should expect is that the matter be remanded to the trial court for a hearing and subsequent determination as to whether the original plea of guilty was voluntarily made. It is not for this court to now rule that the defendant is entitled to withdraw his plea.

For the reasons set forth, this Assignment of Error must be denied.

The trial court properly sanctioned the defendant for contempt.

The trial court has remedial contempt powers pursuant to RCW 7.21.050 which provides as follows:

7.21.050 Sanctions-Summary

imposition-Procedure. (1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

The trial court properly followed the procedures of RCW 7.21.050.

The judge certified orally at the time of the conduct and subsequently in the written contempt order that he had seen and heard the conduct of the defendant. The judge imposed the contempt sanction at the end of the proceeding. The purpose of the order was to preserve order in the court and protect the authority and dignity of the court.

Contrary to the assertion of the defendant, the “proceeding” continued over a period of time. The proceeding was not simply the sentencing hearing. The “proceeding” included the defendant’s appearance the following day in which he was offered the opportunity to apologize and a subsequent proceeding on February 22, 2011, where he was, once again, given the opportunity to apologize and avoid sanctions.

The order of February 15, 2010, set forth the conduct of the defendant that was observed by the court. That order further provided that he was not to receive credit for time served until there was an apology. This order was actually unnecessary because he was in custody on the Clallam County cause, and this cause was to be served consecutively to the Clallam County cause.

Following entry of that order, the court continued the proceeding to, once again, give the defendant the opportunity to “purge” his contempt. The 30 day sanction was not imposed until February 22, 2011, at the end of the proceedings when the defendant still declined to apologize for his conduct. *State v. Hobbie*, 126 Wn.2d 283, 892 P.2d 85 (1995). The defendant was offered multiple opportunities to apologize and multiple opportunities to offer information in mitigation of the sanction. The proceeding continued throughout that time. The sanction imposed was well within the authority of the court. RCW 7.21.050(2).


The structuring of the sentence was entirely appropriate, also. The court is entitled to impose a sentence of up to 30 days. Nothing in RCW 7.21.050 addresses the authority of the court to ensure that the 30 day sanction imposed is in addition to any other sentence imposed by the court or to any other sentence which the defendant is currently serving. RCW 7.21.050 does not address how the defendant is to receive credit for the contempt sanction if he is serving other sentences.

The defendant had been transported to the Grays Harbor County Jail from the custody of the Department of Corrections. At the time of his sentencing in this matter he was receiving credit against the sentence imposed by the Clallam County court. The order of February 15, 2011, directed that the defendant was not to receive credit until he apologized. When the defendant still failed to apologize, the court directed in its order of February 22, 2011, that the sentence imposed for the defendant's forgery conviction in this cause was to be served consecutively to the Clallam County cause. The court's final order dated February 22, 2011, was written so that the defendant would received a 30 day sanction for the contempt in addition to any other sentence imposed. The court reasoned, quite correctly, that there was no point to imposing a 30 day sanction if the sentence was simply going to be served concurrently with other sentences that the defendant was serving.

CONCLUSION

For all the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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STATE OF WASHINGTON,

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No.: 41894-1-II

v.

DECLARATION OF MAILING

CHENEY R. SALAZAR,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 13th day of September, 2011, I mailed a copy of the Brief of

Respondent to:

Jodi R. Backlund
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Attorneys at Law
P. O. Box 6490
Olympia, WA 98507

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 13th day of September, 2011, at Montesano, Washington.

Barbara Chapman

DECLARATION OF MAILING